SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-010338

09/11/2013

HONORABLE MARK H. BRAIN

CLERK OF THE COURT
A. Melchert
Deputy

ARIZONA CITIZENS CLEAN ELECTIONS COMMISSION, et al.

JOSEPH KANEFIELD

v.

KEN BENNETT

DAVID D WEINZWEIG

TAYLOR EARL
KELLY A KSZYWIENSKI
MICHAEL T LIBURDI JR.
BRUNN W ROYSDEN JR.

UNDER ADVISEMENT RULING

On September 10, 2013, this matter came before the Court for argument on three motions: (a) plaintiffs' Motion for a Preliminary Injunction; (b) President Biggs and Speaker Tobin's Motion to Dismiss; and (c) the Motion to Intervene by the Goldwater Institute's clients. The Court has reviewed all of the briefs filed by the parties (including the proposed intervenors), and considered all of their arguments. In light of the pressing nature of the main issue, this order will only resolve the Motion for a Preliminary Injunction, with a ruling to follow on the other motions in due course.

1. Background

In November 1986, voters passed Proposition 200 (aka the Campaign Finance Reform Act), which set various limits on campaign contributions and was codified at A.R.S. § 16-905. At the time, the Constitution provided:

> The veto power of the Governor, or the power of the Legislature, to repeal or amend, shall not extend to initiative or referendum measures approved by a majority vote of the qualified electors.

Arizona Constitution art. IV, pt. 1, § 1(6).[1]

In November 1998, voters passed two propositions (numbered 105 and 200). Proposition 105 (aka the Voter Protection Act) replaced the provision quoted above with, among other things:

> (A) **Veto of initiative or referendum**. The veto power of the governor shall not extend to an initiative measure approved by a majority of the votes cast thereon or to a referendum measure decided by a majority of the votes cast thereon.
>
> (B) **Legislature's power to repeal initiative or referendum.** The legislature shall not have the power to repeal an initiative measure approved by a majority of the votes cast thereon or to repeal a referendum measure decided by a majority of the votes cast thereon.
>
> (C) **Legislature's power to amend initiative or referendum.** The legislature shall not have the power to amend an initiative measure approved by a majority of the votes cast thereon, or to amend a referendum measure decided by a majority of the votes cast thereon, unless the amending legislation furthers the purposes of such measure and at least three-fourths of the members of each house of the legislature, by a roll call of ayes and nays, vote to amend such measure.

Arizona Const. art. IV, pt. 1, § 1(6). By its terms, Proposition 105 only applied to measures enacted at or after the November 1998 election.

Proposition 200 (aka the Citizens Clean Elections Act) enacted a broad set of campaign statutes codified at A.R.S. §§ 16-940 to 16-961 (it also added § 16-901.01). As pertinent here, the Citizens Clean Election Act added § 16-941(B), which provided (at the time):

> Notwithstanding any law to the contrary, a non-participating candidate:
>
> 1. Shall not accept contributions in excess of an amount that is twenty percent less than the limit specified in section 16-905, subsections a through g, as adjusted by the secretary of state pursuant to section 16-905, subsection j. Any violation of this paragraph shall be subject to the civil penalties and procedures set forth in section 16-905, subsections l through p and section 16-924.[2]

[1] This provision bordered on a dead letter, because the realities of voter turnout meant that a majority of *qualified* voters hardly ever approved anything.

[2] Due to various amendments not at issue, this section currently provides that a non-participating candidate "[s]hall not accept contributions in excess of an amount that is twenty percent less than the limit specified in § 16-905,

And finally, earlier this year the Legislature enacted House Bill 2593 (by a simple majority vote of each house), and the Governor signed it in due course. This bill substantially increases the contribution amounts set forth in § 16-905 (which is not subject to the Voter Protection Act), and thus allowed by § 16-941(B) (which is subject to the Voter Protection Act).[3]

Plaintiffs contend that HB 2593 is unconstitutional under the Voter Protection Act, and thus seek a preliminary injunction which would "enjoin Secretary Bennett from implementing §§ 1 and 2 of HB 2593 as to state-wide and legislative candidates."[4] Absent such relief, HB 2593 will go into effect this Friday, September 13, 2013.

In determining whether to grant a preliminary injunction, the Court must consider: (1) whether plaintiff has a strong likelihood of success on the merits; (2) the possibility of irreparable harm to the plaintiff if relief is not granted; (3) the balance of hardships; and (4) advancement of the public interest. *Shoen v. Shoen*, 167 Ariz. 58 (App. 1990). Having done so, it must balance these factors and determine whether to issue a preliminary injunction. Accordingly, the Court turns first to the merits of plaintiffs' claims.

2. The parties' contentions.

Simply put, plaintiffs acknowledge that § 16-905 would not, standing alone, be subject to the Voter Protection Act, but argue that § 16-941(B) makes it subject to the Voter Protection Act by using it as a basis for contribution limits. Accordingly, plaintiffs claim that the Legislature cannot amend § 16-905 unless (a) it does so through a super-majority, and (b) the amendment furthers the purpose of the act.[5] Defendants, on the other hand, argue that the Clean Elections Act did not enact § 16-905 (i.e., that § 16-905 was not part of the proposition), but instead

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subsections A through E, as adjusted by the secretary of state pursuant to § 16-905, subsection H," and "[a]ny violation of this paragraph shall be subject to the civil penalties and procedures set forth in § 16-905, subsections J through M and § 16-924."

[3] This is not the first time the Legislature has amended § 16-905, but the earlier amendments aren't at issue.

[4] This is the simplified relief requested by plaintiffs through Mr. Kanefield at the hearing.

[5] The purpose of the Clean Elections Act is open to debate. Plaintiffs claim simply that it is to reduce corruption. But the voters who passed the Clean Elections Act undoubtedly had more in mind, such as "leveling the playing field" through the matching funds provision that has since been declared unconstitutional. *See Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2825 (2011) (while striking down the matching fund scheme, the Court noted, "There is ample support for the argument that the matching funds provision seeks to 'level the playing field' in terms of candidate resources."). They also presumably hoped that the Act would encourage people to run using public funds (and forego traditional fundraising altogether), a purpose that seems likely unconstitutional. This Court believes it obvious that the Voter Protection Act does not require amendments to further the purpose of an act if that purpose is unconstitutional. And, between the elimination of the matching-fund provision and the rise of independent expenditures (*see Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010)), one can wonder whether any real purpose of the Act remains to be served.

merely enacted a formula that used figures from § 16-905, so that the Legislature can amend it without regard to the Voter Protection Act. Alternatively, Secretary Bennett and the intervenors claim that the existing limits in § 16-905 are unconstitutional under the First Amendment because they are too low.[6] *See Randall v. Sorrell*, 126 S. Ct. 2479 (2006) (invalidating Vermont's campaign financing limits and identifying Arizona's limits as constitutionally suspect).

3. The Court's thoughts on the merits.

Whether § 16-905 is subject to the Voter Protection Act is a fairly debatable question, and there is much to be said on both sides of it. But, having considered the matter, the Court concludes that it probably is not. As President Biggs and Speaker Tobin point out, the Clean Elections Act did not use specific figures (it easily could have), but instead adopted a formula which required the use of amounts specified in § 16-905. And, it appears relatively common for initiatives to make references to other statutes; one example here is that A.R.S. § 16-954(C) of the proposition (now renumbered § 16-954(A)) imposed a 10% surcharge on all fines and penalties collected pursuant to § 12-116.01. Subjecting such cross-referenced statutes (and whatever statutes they in turn refer to) to the strictures of the Voter Protection Act could create havoc, and is certainly contrary to the requirements for initiative petitions themselves. Various statutes require the text of a proposition to be provided to the electorate so that they know what they are voting on, and the whole idea of the publicity pamphlets which are sent to every household in which a registered voter resides (as required by law) is also to put forth, before the electorate, the specific measure they are voting on. *E.g. Wilhelm v. Brewer*, 291 Ariz. 45 (2008).

There is a second, more fundamental problem lurking throughout this case, which the Court identified as it was trying to determine the will of the voters in the 1998 election, and it is this: it appears that the 1998 general ballot was improperly constituted because it could apply the Voter Protection Act to the Clean Elections Act *even if a majority of the actual voters in that election did not want that result.* The Court recognizes that the parties did not identify this issue, but it jumped out at the Court as it studied the materials after the argument. Accordingly, the Court will attempt to set forth the issue with some particularity, using examples.

According to the official canvas, 1,037,550 ballots were cast in the 1998 General Election.[7] The Voter Protection Act passed 476,770 to 435,520 (912,290 total votes) and the

[6] They make a similar claim under Arizona's version of the First Amendment, which is typically construed to he coextensive with the federal version. And, the Goldwater intervenors claim that the old limits violate equal protection, an argument that the Court does not currently believe is valid, but in light of the remainder of this ruling need not pursue further.

[7] The Official Canvas is a public record, so the Court can take judicial notice of it. A copy is available at: http://www.azsos.gov/election/1998/Info/ElectionInformation.htm

Clean Elections Act passed 481,963 to 459,373 (941,336 total votes); stated another way, the measures were supported by 52.3% and 51.2% of the ballots cast for them, respectively.[8] As related to these two propositions, voters included four groups: (1) voters who supported both measures, (2) voters who favored Clean Elections but not Voter Protection, (3) voters who favored Voter Protection but not Clean Elections, and (4) voters against both measures.

Using the actual outcome from the 1998 General Canvas, here are four possible ways that people could have cast their ballots, assuming that everyone who cast a ballot regarding that Voter Protection Act (VPA) also cast a ballot regarding the Clean Elections Act (CEA).

Chart #1[9]

| | VPA yes | VPA no | VPA no-vote[10] | CEA totals |
|---|---|---|---|---|
| CEA yes | 22,000 | 435,520 | 24,443 | 481,963 |
| CEA no | 454,770 | 0 | 4,603 | 459,373 |
| VPA Totals | 476,770 | 435,520 | 29,046 | |

Chart #2

| | VPA yes | VPA no | VPA no-vote | CEA totals |
|---|---|---|---|---|
| CEA yes | 200,000 | 260,000 | 21,963 | 481,963 |
| CEA no | 276,770 | 175,520 | 7,083 | 459,373 |
| VPA Totals | 476,770 | 435,520 | 29,046 | |

[8] For what it's worth, Proposition 201's ban on cockfighting passed 666,058 to 312,368 (i.e., 68.1% of the votes cast on this proposition favored it).

[9] It is admittedly unlikely that the votes were cast in anything approaching this distribution—one suspects that a healthy number of people supported both measures, and another healthy number of people opposed both measures. The Court offers it as an example, and notes that charts 3 or 4 are probably far closer to reality.

[10] This column represents voters who cast a ballot regarding the Clean Elections Act but not the Voter Protection Act.

Chart #3

| | VPA yes | VPA no | VPA no-vote | CEA totals |
|---|---|---|---|---|
| CEA yes | 400,000 | 77,000 | 4,963 | 481,963 |
| CEA no | 76,770 | 358,520 | 24,083 | 459,373 |
| VPA Totals | 476,770 | 435,520 | 29,046 | |

Chart # 4

| | VPA yes | VPA no | VPA no-vote | CEA totals |
|---|---|---|---|---|
| CEA yes | 456,000 | 10,963 | 15,000 | 481,963 |
| CEA no | 20,770 | 424,557 | 14,046 | 459,373 |
| VPA Totals | 476,770 | 435,520 | 29,046 | |

Note that in each of these scenarios, only a *minority* of the voters *who actually cast ballots* intended for the Clean Elections Act to be subject to the Voter Protection Act. A distribution along the lines of Chart # 4 comes closest to a majority vote for a voter-protected clean elections scheme, with 49.98% of the voters (456,000 of 912,290) who cast a ballot for the Voter Protection Act wanting a Clean Elections Act that was voter-protected. And this is not an outlandish scenario, as it would occur if "only" 95.6% (456,000 of 476,770) of the supporters of voter protection wanted clean elections.[11]

There are, of course, other voting distributions, using the actual votes cast, through which a majority of actual voters would have wanted the Clean Elections Act to be subject to the Voter Protection Act. But at this juncture, it is impossible to tell whether that was the will of the voters or not (and the Court suspects that there is no going back to find out because the ballots have presumably been destroyed pursuant to A.R.S. § 16-624(A)).

[11] There are other ways that separating voter protection from clean elections could distort the process. After all, a significant number of voters simply declined to vote on clean elections or voter protection, but some likely voted (one way or the other) on one issue but not the other.

The problem, as people versed in Game Theory could probably better explain, is that by allowing separate votes on two propositions, one of which directly acts on the second, the outcome can appear to be *what the majority demonstrably did not want.* And this danger is heightened where, as here, the margins of victory are slim. The problem could have been avoided altogether if the drafters of the Clean Elections Act had included an additional statute (perhaps numbered § 16-962) which provided, "The legislature shall not amend this act absent a ¾ vote from each house for an amendment which furthers its purpose." They did not. Using an election to enshrine Clean Elections via the Voter Protection Act absent a ballot designed to determine whether this is the will of the voters is no way for a democracy to operate. *See State ex rel. Nelson v. Jordan*, 104 Ariz. 193 (1969) ("In this a democratic society, we are irretrievably wedded to the principle that, subject to constitutional limitations, the will of the majority as expressed in free elections must prevail."). It amounts to logrolling. The bottom line is that § 2 of the Voter Protection Act is probably invalid to the extent that it purports to apply voter protection to the Clean Elections Act and other statutory changes set forth on the ballot for the 1998 General Election.[12]

4. Conclusion.

Plaintiffs' chances on the merits appear slim for each reason set forth above (and slimmer yet when both reasons are considered together). And in light of the First Amendment issues presented, the Court cannot conclude at this juncture that irreparable harm will occur, nor that the balance of the hardships or public interest favors the entry of a preliminary injunction.[13] If plaintiffs wish, they are certainly welcome to file further briefing on the apparent structural problem of the 1998 ballot noted above. In the meantime,

IT IS ORDERED that plaintiffs' Motion for Preliminary Injunction is DENIED.

IT IS FURTHER ORDERED signing this minute entry as a formal written Order of the Court.

/ S / HONORABLE MARK H. BRAIN

HONORABLE MARK H. BRAIN
JUDICIAL OFFICER OF THE SUPERIOR COURT

[12] The Voter Protection Act is not, of course, unconstitutional as applied to subsequent legislation because, at that juncture, the voting public would be on notice that subsequent propositions would be subject to it, so they could cast their ballots accordingly.

[13] This is true even if the Court is dead wrong on its "improper ballot" analysis.